No. 1584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA DEVELOPMENT COMPANY (a corporation),
Appellant,

vs.

THE NEW LIVERPOOL SALT COMPANY, (a corporation),
Appellee.

APPELLEE'S POINTS AND AUTHORITIES.

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The first proposition discussed in "Closing Brief of Appellant" is "the Circuit Court for the Southern "District of California had no jurisdiction to decree "an injunction in effect abating a nuisance caused by "the construction of intakes in the Republic of "Mexico."

The allegations of the bill of complaint dealing with waste waters are:

> "That waste water in very large quantities is still running into said lake and increasing the size

thereof, and the danger that all of the property of the complainant will be covered by water and its property and business destroyed." (Par. IX, p. 66, This is admitted by the answer, p. 108.)

"That all of the flooding and overflowing of the lands of complainant as hereinbefore set forth is caused by, and is the result of the diversion by defendant from the Colorado River of the streams of water as hereinbefore set forth in excess of the amount required for any useful purpose whatever; and a continuance of such overflow and flood will result from the continued diversion by defendant of the waters of the Colorado River which naturally flow in another direction." (Par. XI, p. 67.)

"That defendant will, unless restrained by this court, continue to divert from the Colorado River large quantities of water which would naturally flow in another direction, so that the same will flood and overflow all of the lands of complainant, and thereby destroy the property and business of complainant, and occasion complainant great and irreparable injury. That plaintiff has no adequate remedy at law." (Par. XII, p. 67.)

This would seem to be amply sufficient, especially in conjunction with a prayer for general relief, to warrant the decree.

Appellant lays great stress upon the allegation of the bill that, unless the defendant be required to construct head works for controlling and regulating the amount of water flowing into its canal, the overflow complained of will continue, and (appellant) contends that this is really the injury of which we complain.

The injury charged in the bill of complaint resulted from the discharge of waste waters which flowed upon

complainant's land. It was of no concern to complainant how much water was diverted, as long as the quantity diverted was so used as that none of it should flow upon its land. The allegation upon which counsel lays so much stress might be omitted from the bill entirely, and there would still remain sufficient upon which to base the decree which was entered below. Indeed, it will be observed that the decree does not require defendant to construct any headgates, but enjoins it from discharging waste waters, and requires it to regulate the flow of the water which it does divert.

In

Allen v. Woodruff, 96 Ill. 11, 18,

the court said:

> "It often happens, as in the case before us, that in framing a bill in chancery the pleader, after having correctly stated the actual facts of the case, which is all the law requires, proceeds to make some additional allegations with respect to what the pleader supposes to be the legal effects of those facts, which may be entirely erroneous, yet the complainant in the case is not to be concluded or prejudiced by such unnecessary statement. His rights must depend upon the actual facts stated, and not upon the erroneous conclusions of the pleader with respect to them."

If the point now made by counsel had been urged in the court below, and it had been deemed to have any weight, it could have been cured by an amendment. While it is true there was a demurrer to the bill of complaint, neither upon the argument of the demurrer

nor upon the trial of the case was any suggestion of this kind made. There is no hint of anything of this nature in any assignment of error.

When the decree was entered the only headgate or intake which defendant had was the one at the head of its canal in the State of California. Before the entry of the decree the two intakes in Mexico had been permanently closed, but nevertheless waste water was being discharged into Salton Sea.

Furthermore, at the time of the commencement of the suit, and for a long time thereafter, the diversion through the California intake was very large, amounting on the date of the filing of the complaint to 1110 second feet, and increasing thereafter until, on the 21st of March, the diversion through that intake was 2590 second feet. These figures are from the report of the United States Geological Survey for the year 1905, page 23 (offered in evidence by defendant).

This evidence shows conclusively that Intake No. 1 was open during the month of March, and this is amply borne out by other testimony in the record. Rockwood said (page 1201) that he caused the two upper intakes to be closed in December, 1904, by means of sack-brush dams, but within two or three days there was a rise in the river which broke both of the dams. There is no hint of any dam having been constructed at Intake No. 1 after that time. He also said (page 1228) that those dams were simply put above the water sur-

face as it then existed with the intention of raising and strengthening them later; and further said (same page):

> "You must remember too that these dams were put in simply for the purpose of proving whether or not my theory was correct, that by stopping the water from coming in at the two upper intakes, it would increase the flow at the lower. Consequently, my only object was to prevent the flow of water *for the time being,* in order that I might prove my theory to be correct or false."

There is no claim that any dam was constructed at the head of Intake No. 1 after the temporary dam was washed out in December, 1904, and, indeed, if any such claim were made, it would be flatly contradicted by the record of measurements to which we have called attention.

The case of

Cushing v. Pires, 124 Cal. 663,

was one for an injunction to restrain the defendant from destroying a culvert constructed to carry off surface waters. Upon appeal it was claimed the complaint did not state a cause of action. The court said:

> "On an inspection of the record we cannot say that this argument is altogether without foundation. But we find that no such argument as this and no objection of this nature was at any time presented to the court in which the case was tried. There was no demurrer to the complaint, and no motion based upon a variance between the pleadings and proof, and to such evidence as might have been objected to on the ground that it was not pertinent to the case made by the pleadings no such objection was made. Had counsel made the ob-

jection he here urges and presented his argument in support thereof at the trial with the same force and clearness as in his brief in this court, it would have resulted, probably, in an amendment of the complaint. He did not do this, but proceeded with the trial as if all the matters to which the evidence was directed were properly in issue. The findings and judgment were clearly supported by the evidence, and the case was decided correctly on the merits.

* * * * * * * * *

"It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be over zealous to find a defect in a complaint that the appellant himself failed to discover until the case had been decided against him on its merits. We think the defects in the complaint, as well as the variance complained of, are of a nature to be waived by failure to call them to the attention of the trial court by proper objections, and that defendant should not be heard to urge those objections for the first time after judgment."

In

Holman v. Boston L. & S. Co., 45 Pac. (Colo.) 519, 521,

it was said:

"But the issue upon the defective character of the machinery, as the cause of the fire, which was injected into the case by the evidence, was accepted by both sides, without question, as the main issue for trial. Their tacit agreement as to the questions involved controlled the course of the trial, and the proceedings subsequent to the trial. It was acted upon throughout by the trial judge, and the arguments of the respective counsel in this court

> are based upon the same theory of the case which they mutually adopted below. We are therefore compelled to disregard the pleadings, and decide the case as the parties have seen fit to present it to us."

The Supreme Court of the United States has forcibly expressed itself in the same connection. The case of

> *Wasatch M. Co. v. Crescent M. Co.,* 148 U. S. 292, 37 L. Ed. 454,

was one for the reformation of a deed. The appellant contended that the complaint stated a case for reformation for fraud, while the findings showed one for mistake, and that there was, therefore, a variance. It was also contended that the complaint did not set out the true contract as shown by the evidence. The court held that the objections came too late, saying:

> "The Supreme Court of the territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings, and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error, for matters so waived.
>
> "The doctrine on this subject is well expressed in the case of *Tyng v. Commercial Warehouse Co.,* 58 N. Y. 313: 'No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of the plaintiff. Had any such objection been made it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the code of procedure. It would, therefore, be highly unjust, as well as un-

supported by authority, to shut out from consideration the case, as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after a trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings.'

"No injustice is done the appellant by thus disposing of this objection, because the facts conclusively show that the written contract between the parties was not annulled or a new one substituted, but that it was substantially executed—the defendant simply accepting other conditions than those stipulated in its favor and delivering a deed as averred in the complaint."

To this first point several cases are cited by appellant, but the only one upon which we desire to comment is that of *Gilbert v. Moline Water Power & M. Co.,* 19 Iowa 319. That was an action to enjoin the maintenance of a dam on the Illinois side of the Mississippi River, the result of which was to flood the land of the plaintiff in Iowa. The court held that it had no jurisdiction to award the relief. The only case relied upon by the Iowa court is *Mississippi & Missouri R. R. Co. v. Ward,* 67 U. S. 485, the true doctrine of which we think the Iowa court misconceived and wrongly applied. The Iowa case differs radically from this, however, in that no part of the defendant's works were in the State of Iowa; whereas the greater portion of the canal system of the de-

fendant, and the portion from which defendant was actually discharging water on to complainant's lands, was in the State of California.

In all the cases upholding the right of action for injuries to land in one jurisdiction, resulting from acts in another jurisdiction, *Bulwer's case,* 7 Coke Rep. Ia. 77 Eng. Rep. 411, is cited. In that case B brought an action on the case in the County of N for maliciously causing him to be outlawed in London upon process sued out of a court at Westminster and causing him to be imprisoned in N upon a writ issued at Westminster. It was held that in all cases where the action is founded on two things done in several counties, and both are material or traversable, and one without the other does not maintain the action, the plaintiff may bring his action in which county he will. In the course of the opinion, the chancellor cites all the previous cases to the point and, among other things, says:

> "If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4, 8; or I may bring in Middlesex, for there I have the damage, as it is proved by 11 R. 2. Action sur le Case 36."

High on Injunctions, 2nd Ed., section 803, says:

> "It is also to be observed that the remedy by injunction being primarily in personam, a nuisance consisting of an injury to water rights may be enjoined in the state which has jurisdiction of the person committing the injury regardless of the *locus* of the nuisance itself."

In

Foot v. Edwards, 9 Fed. Cases No. 4908,

the defendant diverted water in Connecticut from a stream which had its rise in Connecticut, and thence flowed into Massachusetts. The diversion by the defendant caused the flow to cease past plaintiff's mill which was situate upon the same stream in Massachusetts. The court reviews the authorities and comes to the conclusion that an action could be brought in either state, and summarizes the holding of Woodbury, Judge, in

Stillman v. White Rock Mfg. Co., Fed. Cases No. 13,446,

as follows:

> "If a mill situate in one state is injured by the diversion, in another state, of the stream upon which it is situate, and a suit for such diversion should be brought before the federal court in the state where the mill is situate, such suit would be properly brought, and such court would have jurisdiction of the case."

The court, however, in the latter case held that an action was properly brought in Rhode Island, the jurisdiction in which the diversion of water occurred and which injured the mills in Connecticut. It was contended by the defendants that the action should have been brought in the jurisdiction in which the injury occurred.

In

Great Falls Mfg. Co. v. Worster, 23 N. H.; 3 Foster 462,

the plaintiffs owned a dam extending across the boundary river into the State of Maine. The defendant was a citizen of New Hampshire. Defendant destroyed a part of the dam and threatened to remove the whole of it, the injury being in the State of Maine, resulting in injury to plaintiff in New Hampshire. The court reviews the earlier authorities with regard to extra territorial jurisdiction of equity and holds that it has jurisdiction in this case, saying:

> "It would be a great defect in the administration of the law, if the mere fact, that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding, that the court has jurisdiction to issue the injunction prayed for."

It was held in

Rundle v. Delaware & R. Canal, 21 Fed. Cases 12,139,

which was an action for diversion of water,—although the decision is not directly in point upon other grounds,—that although the earlier cases, which the court reviews, apply to counties, the same reasoning would apply to different states.

To the same point, Justice Holmes, in

Manville v. Worcester, 138 Mass. 89,

says:

> "As between two states, both of which recognize the right, if the rule is to vary at all, it should be on the side of a greater liberality to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained,"

which was an action for tort for diverting the waters of a natural stream in Massachusetts and preventing them from flowing past the plaintiff's mill in Rhode Island. Justice Holmes in this case also shows that there is no distinction between the diversion of flowing water to which land is entitled and the discharging of water upon land, saying:

> *"but we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative, but in each it is consequence of an act done outside the jurisdiction where the harm occurs and the consequence is as direct in the latter case as in the former."*

Both of these last mentioned rules are adverted to in

Willey v. Decker, 100 Am. St. 939, at page 970.

The case there was an action to restrain the defendants from diverting water in Montana of which there had been a prior appropriation in Montana by the plaintiff for use upon lands in Wyoming. The action was commenced in Wyoming. Objection was made to the jurisdiction upon the ground that the cause of the injury arose outside the state. The court reviews the cases on the subject and says, at page 971:

> "On principle and authority, therefore, we think there can be no doubt of the jurisdiction of the District Court to render a decree restraining the defendant Demmons from diverting the waters of the stream in Montana to such an extent as to deprive those plaintiffs whose lands are situated in this state to the water to which they are found to be entitled by priority of appropriation. As to them, the whole of the injury occurs in this state."

In the case of

Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. 628,

the plaintiff's dams and ditches, as well as its lands to be irrigated therefrom, were situated in Millard county, where the action was brought. The dams and ditches of the defendants were located in Sanpete county. The court observes that neither the facts relating to the diversion alone, nor those relating to the injury alone, are sufficient to constitute a cause of action; that some of the material facts arose in Sanpete county and some in Millard county, and the cause of action may be said to

have arisen in each county. And the court say: "There- "fore, the plaintiff's had the right to elect in which "they would bring their action".

The rule in California is the same. In

Lower Kings River W. D. Co. v. Kings R. & F. R. Co., 60 Cal. 408,

the plaintiff diverted water in Fresno county by means of a ditch for use in Tulare county. The defendant at the head of the ditch in Fresno county diverted some of the water belonging to the plaintiff. An action was brought for damages and an injunction against the further diversion in Tulare county. A motion for change of venue was made upon the ground that the action should have been brought in Fresno county, the place where the diversion occurred. The lower court denied the motion and an appeal from the order was taken. The court in affirming the order said:

> "The acts complained of are preventing water from flowing in plaintiff's ditch; the ditch is located in both counties; therefore the subject of the action is in both counties, and the action might have been brought in either. It is true that the specific act complained of, viz.: the diverting of the water, occurred in Fresno county, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but the consequences of that act operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare county as to that in Fresno county. In no sense can the injury be said to be confined to that part of the ditch in Fresno county. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself. Such is the case as now presented to us."

That case was affirmed in

Last Chance W. D. Co. v. Emigrant D. Co., 129 Cal. 277.

In this latter case the plaintiff was the proprietor of a water ditch situate partly in Fresno county and partly in Kings county, through and by means of which it takes and supplies to its stockholders water which it has appropriated from the Kings River. The diversion by the plaintiff occurred in Fresno county, as also did that of the defendants. An action was brought in Kings county to enjoin the defendant. A motion was made for change of venue upon the ground that the action should have been commenced in Fresno county, the place of the diversion. The motion was denied and the defendant appealed. The court in affirming the order, Justice Harrison writing the opinion, said:

> "The case falls directly within the principles declared in *Lower Kings, etc., Ditch Co. v. Kings River, etc., Canal Co.,* 60 Cal. 408, in which it was held that plaintiff's right to have water flow in the ditch is coextensive with its right to the ditch, and that, although the act of diverting the water was committed in Fresno county, it was an injury to that portion of its ditch which was in Tulare county, and that the action was properly brought in the latter county. In *Drinkhouse v. Spring Valley Water Works,* 80 Cal. 308, it was held that a suit for an injunction to restrain the defendant from building a dam which, when completed, would permanently flood the plaintiff's land was a suit for an injury to real property, and under section 392 of the Code of Civil Procedure the county in which was situated the property that would be injured was the proper place for its trial, even though the action did not seek for damages."

In

Anderson v. Bassman, 140 Fed. 14,

the plaintiffs were riparian owners of lands on a stream in California. The defendants were appropriators of the water for irrigation purposes from the same stream in Nevada. The appropriators of water in Nevada sought an injunction against the riparian owners in California to enjoin them from the use of the water in excess of their rightful quantity. The action was brought in the Circuit Court of California.

> "It is objected by the defendants that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the court to pass upon titles to real property in another state. This question was considered by Judge Knowles in the United States Circuit Court for the District of Montana in the case of Howell v. Johnson, 89 Fed. 556, and later in the case of Morris v. Bean (C. C.), 123 Fed. 618. In each of those cases the complainant was a citizen of Wyoming, and the defendants citizens of Montana. The complainant owned land in Wyoming, and for the purpose of irrigating the same appropriated certain waters of a creek which had its source in Montana, flowed for some distance within its boundaries, and then entered the State of Wyoming. The complainant's point of diversion and ditch conveying the waters were within the State of Wyoming. Defendants settled along the banks of the creek in Montana, above the land of the complainant, and subsequently to the appropriation by complainant diverted the waters of said creek to their own lands, preventing its flow to the lands of the complainant. In the suit brought by complainant in the United States Circuit Court

> to *enjoin* the defendants from so diverting the waters of said creek the question of the jurisdiction of the federal court was raised by the defendants. The court held that one who has acquired a right to the water of a stream flowing through the public lands by prior appropriation, in accordance with the laws of the state, is protected in such right by sections 2339 and 2340 of the Revised Statutes (page 1437, U. S. Comp. St. 1901), as against subsequent appropriators, *though the latter withdraw the water within the limits of a different state.*"

The case of

Miller & Lux v. Rickey, 127 Fed. 573,

arose out of a suit for an injunction brought by the users of water in Nevada against citizens of California. The plaintiffs appropriated the water in California for use on their lands in Nevada. The defendants diverted the water belonging to the plaintiffs in California. The defendant interposed a plea to the jurisdiction of the court contending that the nuisance taking place in California the Circuit Court of California should have cognizance of the matter only. Judge Hawley, sitting in the Circuit Court for Nevada, after reviewing the authorities, held that the Nevada court had jurisdiction. The case was then appealed to the Circuit Court of Appeals for the Ninth Circuit, where Judge Wolverton delivered the opinion of the court, concurred in by Judges Gilbert and Ross. The court again reviews the authorities and affirms the decision of Judge Hawley, saying:

> "If such be the law where the *res* is without the jurisdiction of the court, by how much stronger

> will be its application where the jurisdiction extends over the *res* as well as the person. So that the court having jurisdiction of the *res*—that is, of the thing in controversy, which is the realty in the present instance—has undoubted authority and jurisdiction, having also jurisdiction of the person to protect the thing against the encroachments of the person, whether those encroachments come from within the state or without." (152 Fed. 11, 17.)

The second point made by counsel is "the Circuit " Court had no jurisdiction to compel the defendant to " construct headgates in the Republic of Mexico; for " the reason that the defendant would not have been " permitted by the laws of the Republic of Mexico to " construct such headgates" (Brief, p. 24).

Counsel loses sight of the double aspect of the case. But, taking his view as to the facts, is his conclusion of law therefrom justified?

Counsel cites in support of his contention *Texas & Pac. R. R. Co. v. Gay,* 25 L. R. A. 52 (Brief, p. 25), which case, only goes to the point that a court of equity cannot put a receiver in control of land outside the jurisdiction.

He also cites *Port Royal R. R. Co. v. Hammond,* 58 Ga. 523 (Brief, p. 27), which case holds that specific performance of a contract to be performed outside the jurisdiction and which involves supervision by the court will not be decreed.

Such a case arose in Indian Territory, involving the sale of oil wells, the contract for which also provided that the wells were to be worked. The Court of Appeals of Indian Territory held:

> "We are of the opinion that a court of equity in the Indian Territory should not undertake to operate an oil lease in the territory of Oklahoma, where the agreement is wholly *indefinite* as to the manner of working and the extent of the operations to be carried on."

This is believed to be the extent to which like opinions go, and that where the thing to be done and the manner of performance are definite equity will interfere. This is

Wilhite v. Skelton, 82 S. W. 932.

The case was, however, appealed to the United States Circuit Court of Appeals for the Eighth Circuit, 149 Fed. 67. It was there contended that the judgment of the lower court should be sustained upon the same ground—that a court of equity will not decree specific performance where the contract requires constructive work and supervision by the court. Judge Sanborn, however, said:

> "(3) Because the court was without power to operate the mine on the leasehold property which was in the territory of Oklahoma and beyond its jurisdiction, and because, if it had held the power, such operation would have been impracticable. But the court had jurisdiction of the persons of the defendants, and thereby had plenary power to compel them to act in relation to the leasehold without its jurisdiction which they owned and to which their contract related."

It will be granted, no doubt, that the maintenance of water upon the land would ultimately create a servitude. Appellant's contention is, in effect, that it could not construct controlling gates at the Mexican intakes without the consent of the government of Mexico—that it could not act until the Mexican Government acted. This would seem the equivalent of saying that the Republic of Mexico by its inaction could authorize the defendant company to create and maintain a servitude upon lands within the jurisdiction of the Circuit Court of the United States.

To this point, it was said by Justice Holmes in

Manville Co. v. City of Worcester, 138 Mass. 89, that

> "Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes. * * * So far as their creation is concerned the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it sees fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two states and by the power over its own territory which it holds in reserve."

A complete answer to this second point, however, is that it was not necessary that defendant should con-

struct headgates in order to prevent the diversion of water through the Mexican intakes. The fact is that it did not construct a headgate at either of those intakes. It constructed permanent dams there. In other words, it placed there the sort of obstruction which Rockwood testified he instructed his men to build in March, April and May, 1905. There is no showing that the consent of the Republic of Mexico was necessary in order to place these dams, nor is there any showing that its consent to the building of dams was ever obtained or asked.

The seventh objection of counsel is:

> "The injunction was in effect a mandatory injunction. A court of equity rarely decrees a mandatory injunction requiring the performance of constructive in contradistinction to destructive work, and will never decree a mandatory injunction when the work commanded to be done requires in its execution such skill, judgment and technical ability as was required to close the intakes complained of." (Brief, p. 50.)

To support this, counsel quotes at page 51 of his brief:

> "It is not to correct a wrong of the past, in the sense of redress for the injury already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its *maintenance or continuance,* which is a part of the act complained of; and its maintenance can only be stopped so as to prevent its injury by its removal. The removal of the

dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes."

Troe v. Larson, 35 Am. St. 336; 84 Iowa 649.

The remainder of the quotation is:

"The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes, and no technical application of a rule as to a mere method of procedure should be allowed to defeat so plain a rule of justice.

"It is said that the cases in which mandatory injunctions have issued are those of continuing trespasses or nuisances in which the defendant owned the land on which the nuisance was kept, or was active in continuing a trespass or nuisance on the land of the complainant; and it is sought to distinguish this case, because these defendants have not, since the building of the dam, *done any act or asserted any right to maintain the dam.* The dam came into being, and continues to be, because of their act of construction. The injury or trespass results from the wrongful act of construction, and the act continues or is coexistent with the trespass. While the dam continues as the result of their act of construction, they may be said in legal contemplation to be every day maintaining it. We are cited to no authority announcing a contrary rule, and it certainly accords with reason."

That was an action to compel the defendants to remove a dam erected by them across the mouth of Silver Lake, whereby the lands of plaintiffs adjacent thereto were overflowed. The decree of the district court restrained the defendants from maintaining the dam, and ordered that they should remove the same within sixty days.

The appellants contended that the court should not have so ordered because "it was a past and completed act " and not ground for preventive or mandatory injunc- " tion". The judgment of the lower court granting the injunction was sustained.

In

Gardner v. Stroever, 89 Cal. 26,

the Supreme Court of California holds to the same effect. There the defendant erected a building in the public road cutting off access to the slaughter house of the plaintiff.

> "It is further urged that the injunction ought not to have been granted, because it appeared that the obstruction sought to be enjoined actually existed at and before the time of filing the complaint (citing *Gardner v. Stroever,* 81 Cal. 148).
>
> "This position cannot, in our opinion, be sustained. An obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and the statute says it may be enjoined or abated. Such an obstruction must necessarily have an actual existence before it can be a nuisance. The judgment here might have been in direct terms that the obstruction be removed and the nuisance abated; but the mandatory injunction granted was evidently intended to have, and did have, the same effect. It was therefore an authorized and appropriate remedy."

It was early contended that after the wrong was committed, equity would not command the defendant to do anything but would simply command him to refrain and a decree was framed by Lord Chancellor Eldon to obviate the difficulty.

See

Lane v. Newdigate, 10 Ves. Jr. 192, 32 Eng. Rep. 818.

There

"The bill prayed, that the defendant may be decreed so to use and manage the waters of the canals as not to injure the plaintiff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the *Arbury* Canal to *Kenilworth* Pool, and to restore *Kenilworth* Stopgate, and the banks of the canal to their former height; and also to repair such stopgates, bridges, canals, and towing-paths, as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory; thereby injuring the machinery; and, that he may be decreed to pay the plaintiff the expense he has been put up to by working the steam engine, to supply the want of water.

"The *Lord Chancellor*, upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the court to decree or order repairs to be done. (See 1 *Ves. Jun.* 235.)

"*Nov. 2d, 13th, Mr. Romilly,* in support of the injunction, said, the repairs to be done in this case are in effect nothing more than was done in *Robinson v. Lord Byron (1 Bro. C. C.* 588): viz., raising the dam-heads, so that the water shall not escape; as it will otherwise.

> "The *Lord Chancellor* (Eldon). So, as to restoring the stopgate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms, that will have that effect. The injunction, I shall order, will create the necessity of restoring the stopgate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works."

The chancellor then proceeded to frame a decree sufficient to meet the necessities of the case.

In

> *Goodrich v. Georgia R. & B. Co.*, 41 S. E. 659 (Ga.),

the plaintiff owned land through which ran two streams. These were dammed by defendant for the purpose of creating a water supply for its railroad. The defendant was diverting the water from a reservoir thus formed by means of ditches. It was

> "contended that the order granting the injunction, when applied to the facts of the present case, would have no other effect than to compel the defendant to perform an act, and that the writ of injunction cannot be used for this purpose under the law of this state."

The code of the state provided:

> "An injunction can only restrain; it cannot compel a party to perform an act. It may restrain until performance."

The court held, however:

> "If the main purpose of the petition is to compel the performance of an act, then, under our Code, injunction cannot be used as a remedy to accomplish this purpose. Under our Code injunction can be used only to restrain. It does not necessarily follow, however, because injunction can be used only for this purpose, that it cannot be used when the effect of yielding obedience thereto would incidentally require the performance of some act, if the main purpose of the injunction is to restrain the doing of some wrongful act. It seems to us that the true meaning of the section above quoted is that the court cannot issue a purely mandatory order, but that the court can grant an injunction, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may be incidentally required to perform some act."

Judge Sawyer, held to the same effect in

> *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.,* 1 Sawyer 470; 6 Fed. Case No. 2989.

Plaintiff, in excavating a tunnel in a mountain to its mining claim, struck a subterranean flow of water, which it appropriated. Defendants ran a tunnel into the mountain directly below that of plaintiff and thus intercepted plaintiff's flow of water. Judge Sawyer said:

> "It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a water-tight wall or bulkhead across the tunnel at a point indicated. But it is urged, that the injury has been committed, and that, this being so, the court will not, on motion for a preliminary injunction, issue a mandatory writ, affirm-

atively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be.

"But, while this seems to be an established rule, it, also, appears to be well established that the result sought may be accomplished by an order merely restrictive in form. For example, if the water of a stream be raised by means of a dam, so as to wrongfully flood a party's land above, or obstruct with back-water, a mill situated higher up the stream, while the court will not direct the defendant in terms to remove the dam, it will require him to refrain from overflowing the land, or obstructing the mill, even though it be necessary to demolish the dam in order to obey the injunction. So if a party, by means of a dam, or canal, should wrongfully divert the water of a stream from the mill of his neighbor, clearly entitled to it, *the court would restrain the continuance of the diversion, even though an obedience to the injunction should render it necessary to remove the dam*, or fill up the canal. 2 Eden, Inj., by Waterman, 388; 3 Daniell, Ch. Pr. 1767, and notes, last edition. Robinson v. Lord Byron, 1 Brown, Ch. 588; Lane v. Newdigate, 10 Ves. 192; Rankin v. Huskisson, 4 Sim. (6 Eng. Ch.) 13; Earl of Mexborough v. Bower, 7 Beav. (29 Eng. Ch.) 127; Murdock's Case, 2 Bland, 470, 471; Washington University v. Green, 1 Md. Ch. 502-504; North of England C. & H. J. R. Co. v. Clarence R. Co., 1 Colly. (28 Eng. Ch.) 521; Spencer v. London B. R. Co., 8 Sim. (8 Eng. Ch.) 193.

"Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, *even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel to accomplish the end sought.*"

The eighth objection is:

> "The court had no jurisdiction to decree an injunction in this suit in the absence of a determination at law that the acts of the defendant complained of constituted a nuisance."

To this extracts from *Pomeroy's Equity Remedies* are cited. In section 521 of that work it is shown that, when plaintiff's title is clear or is proven and when the facts of the nuisance are undisputed or the proof shows there is a nuisance, there need be no prior determination at law. Section 522 discusses the point where there is some doubt either as to the title or the fact of the nuisance. That section reads:

> "The class of cases not yet discussed is that in which on application for a permanent injunction, the plaintiff's right, or the fact that a nuisance exists, is doubtful on the evidence before the court, and the parties do not consent to have the controversy settled by the court of equity. In this situation the general doctrine is that 'either party is entitled to insist that the questions on which the legal rights depend should be tried at law.' Satisfactory grounds to support this rule as a matter of reason are not to be found in the cases. Doubtless the explanation of it is largely the fact that in early days the courts of equity were reluctant to undertake the decision of purely legal rights, or questions of fact which ordinarily were tried by a jury. It was 'a rule of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction.' As such, the grounds on which it arose have largely, if not quite, disappeared with the decay of all hostility of the courts of law against the equity courts and the general merging of both law and equity functions in the same courts. The rule, however, still persists in

most jurisdictions in which it has not been abrogated by statute. It has never gone so far, however, as to require the plaintiff's bill to be dismissed because the legal questions had not been determined; the court may retain the bill and procure their ascertainment by directing an issue, or an action, or a case stated, at law; basing its final decree upon the results thus reached. In leaving the subject it should be noted that when the bill is to enjoin a threatened, as distinguished from an existing, nuisance, from the nature of the case the requirement of a previous trial at law cannot be applied. 'No such question in this case can be tried at law, no nuisance exists—the object of the bill is to enjoin the defendant from creating one.' From the foregoing discussion it would appear that the following is an accurate summary of the general rules of equity with respect to the requirement of a previous establishment of the plaintiff's right at law. The requirement does not apply at all to applications for temporary injunctions; nor to bills for permanent injunctions on account of irreparable injury, when the defendant admits the plaintiff's right, or when the right is clear in favor of one of the parties, though disputed, or when both parties consent to a trial of the merits by the equity court; nor to bills for permanent injunctions against threatened, as distinguished from existing, nuisances; it does apply to all other bills for permanent injunctions, but there is a tendency to do away with the requirement by statute or judicial innovation."

In the *note,* Pomeroy says:

"In England, the rule is abolished by statute. The reform procedure has accomplished the same result in New York as California. Lux v. Haggin, 69 Cal. 255, 284."

In

Lux v. Haggin, 69 Cal. 284,

it is said:

> "Under our codes the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must indeed clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied. But if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability."

The rule laid down by the *American and English Encyclopedia of Law,* Vol. 1, page 66, is:

> "Formerly this power was exercised only after the right of the plaintiff and the fact of the nuisance had been first established in a court of law. But at present, where the plaintiff's right is clear and the existence of a nuisance is manifest, a court of equity will interfere to give relief, and it is only when the plaintiff's right, or the question of nuisance, is doubtful that a previous settlement at law is necessary."

EQUITY WILL PROTECT THE FREEHOLD AND THE RIGHTS OF PROPERTY THEREIN, EVEN THOUGH THE BUILDINGS AND THE SALT DEPOSIT ARE, BY REASON OF APPELLANT'S ACTS, DESTROYED.

It is perhaps unfortunate that the freehold and right to beneficial enjoyment of its property still exist in the appellee sufficient to sustain an injunction against a continuance of the tortious acts of appellant, and thereby cause annoyance as stated in counsel's brief (page 101), but such is the fact and the law.

It is true that the land is at present covered by water, that the buildings and machinery are destroyed or removed. But the fact is that when, by reason of the natural forces of seepage and evaporation, provided the injunction obtained is effective and those forces are unhampered by acts of appellant, the water is removed, the land will again be of value to appellee. It can be readily ascertained, simply by reading the bill of complaint, that the object of the suit was to restrain the continued flow of water upon the land, and facts were adduced to show that, if such were the case, the water would dispose of itself and leave a valuable property. It is said the damages allowed covered the value of the land. There is no foundation for this assertion. We recovered judgment for damages for the destruction of improvements which were located on part of our land and for destruction of salt deposit on another portion. We neither asked nor were we awarded anything for damage to the freehold.

No matter how small the damage or what the resultant injury may be, the owner of land is entitled to have his freehold protected from the acts of another which amount to nuisance, trespass or waste.

The action of appellant, against the continuance of which the injunction is directed, has not been merely to interfere with the enjoyment of the property by appellee, but it has resulted in absolutely depriving appellee of the freehold. In other words, such action, if continued, will operate to entirely deprive appellee of the property *and to prevent its use for any purpose whatsoever.*

It was not until Lord Thurlow's time that trespasses of the nature here complained of were enjoined in equity to any extent, but Lord Eldon in *Hanson v. Gardiner,* 7 Ves. 306, 32 Eng. Rep. Reprint 125, and *Thomas v. Oakley,* 18 Ves. 183, 34 Eng. Rep. Reprint 287, crystalized the law. In this latter case the distinction between waste and mere trespass, as recognized by Lords Thurlow and Hardwick, and which counsel for appellant attempts again to revive, was done away with and injunctions were granted both for waste and trespass. This distinction was again referred to by Chancellor Kent in *Jerome v. Ross*, 7 Johns Ch. 315, 11 Am. Dec. 484, and *Livingston v. Livingston*, 6 Johns Ch. 497, 10 Am. Dec. 353. In these cases it was attempted to limit the relief to those cases of an aggravated or extraordinary nature in which the acts were essentially destruc-

tive. The authorities now uniformly follow the doctrine of *Thomas v. Oakley.*

Such is the law in California. In

Learned v. Castle, 78 Cal. 461,

which was also a case of *overflowing* of land in which an injunction was asked, McFarland, J., speaking for the court, said:

> "But the amount of damage estimated in money, *was immaterial.* That finding was only to damage done in 1878, when there was water on the land from other sources. The findings show that the waters diverted by the canal flow upon plaintiff's land, which would not 'flow' there if allowed to take their natural course; and that the embankments erected by defendants 'cause' such artificial flowing. And to thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. It is an injury to the *right* and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. (Richards v. Dower, 64 Cal. 64, and cases there cited; Tooth v. Clifton, 22 Ohio St. 247; 10 Am. Rep. 732; Casebeer v. Mowry, 55 Pa. St. 419; 93 Am. Dec. 766; Wood on Nuisances, 2nd Ed., p. 639). *The right to an injunction, therefore, in such case does not depend upon the extent of the damage measured by a money standard;* the maxim de minimus, etc., does not apply. The main object of the action is to declare a nuisance, and to prevent the continuance by mandatory injunction."

The mere fact of the trespass makes the "injury "irreparable in its nature".

Vestal v. Young, 147 Cal. 715;
Richards v. Dower, 64 Cal. 64;
Moore v. Massini, 32 Cal. 590.

The double aspect of the case is not to be lost sight of. By what has been said, it is not meant to imply that the damage has not been substantial. On the contrary, the once valuable land is now, *in its present condition,* absolutely worthless and will so continue until the appellant is compelled, by virtue of an injunction, to desist from pouring water upon the property. And, on the other hand, it does not follow that it always will be worthless. Indeed, the court must assume the land has value. *It should not be forgotten that we neither asked nor were we awarded any compensation for injury to our land.* The *potential* value of the land is still present, the value which will spring into being the moment the water is allowed, by natural process, to disappear. The case is thus infinitely stronger and appeals more powerfully to a court of equity than any mere case of waste or trespass. Here we have an absolute deprivation of a potentially valuable property, a deprivation absolute in its nature and yet not a destruction in any sense of the term,—a deprivation which, if reasonable precautions, as provided by the injunction, were taken, would soon end, and by no further act of appellant than simply ceasing to do wrong.

Against this it is argued that, because the property is destroyed, which it is not, no injunction may be had. And to make the inconsistency more confounding it is contended that no damages may be had for injuries received because asked for in connection with an injunction.

Upon the argument, counsel for appellant referred very vehemently to a statement on page 95 of the brief of appellee to the effect that on the 26th of March the property of complainant was practically destroyed. It is perfectly apparent from a reference to the testimony upon which the statement was based (and which is found at length on pages 94 and 95 of the brief) that the thought intended to be conveyed was that some of the property of complainant was practically destroyed by the 26th of March. It would be absurd to say that it appeared from the testimony referred to that *all* the property of complainant was practically destroyed by that date.

It is rather a peculiar contention that, because the salt deposit on a portion of the land and the improvements on another portion were destroyed, the land itself is entirely destroyed. It could not be contended that, because a crop of grain is entirely destroyed, damages for the full value thereof would act as a condemnation of the land.

Further, there is no evidence that the land, even that containing the salt, will not be of value. The presumption is it will. Other land in the same district is,—

else why should appellant construct a costly irrigation system? There is only counsel's surmise that the land owes all value to the salt crust. Why could not some grain or vegetable be produced? There is no evidence to show it could not, and the presumption would be rather that it could, for it may be ventured that there is no species of soil upon which something of commercial value cannot be grown. At least, it would seem, in the absence of any evidence to the contrary, complainant should have the benefit of an opportunity.

In this same connection counsel invokes the doctrine of comparative injuries. Contending, first, that as the property of appellee has been entirely destroyed, equity will not interfere when the damage ensuing to third persons from the granting of an injunction is greater in proportion than the relief to complainant; second, that, in any event, the injury resulting to the settlers in Imperial Valley from the injunction would justify its refusal if complainant were otherwise entitled to it.

Counsel for appellant rather slights the law in this regard. No distinction is drawn between interlocutory and permanent injunctions, and only two cases are cited. The law is too plain for argument and the necessity of citation, to show that in cases of preliminary injunction the court may exercise a very sound discretion in granting or withholding them where the balance of convenience is such that the complainant could only be slightly benefited, while the defendant might suffer substantial injury. But, on the contrary, in cases of

perpetual injunction, where the right of the complainant is established, the court has a very slight discretion, and none at all where the act of defendant results in depriving complainant of its freehold. The chancellor does not act as of grace in such case.

> "But that grace sometimes becomes a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. * * * Certainly no chancellor in any English speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiae,* and needs not to be implored *ex gratia.* And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. * * * There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land."

Sullivan v. Jones & Laughlin Steel Co., 66 L. R. A. (Pa.) 712;

Also

Corning v. Troy Iron and Nail Factory, 40 N. Y. Rep. 191, 205.

It is sometimes held that where, if an injunction be issued, it will cause irreparable damage to the public generally, the court may refuse to grant it, especially in the case of a preliminary injunction. This is not in contradiction to the principle laid down *supra* that complainant is entitled to have his freehold protected, without regard to what his damage may be, but it rests in a sound discretion of the trial court. The case of *McCarthy v. Bunker Hill & Sutherland Mining & Coal Co.,* 147 Fed. 191, cited by counsel in support of his contention is not at all in line with the present case.

The damage in that case was comparatively slight and only deprived the complainant of an *incidental* enjoyment of his property.

Respectfully submitted,

PAGE, MCCUTCHEN & KNIGHT,

Of Counsel for Appellee.